IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Pukhraj vs. Gangaram Bishnoi

S.B. Civil Misc. Appeal No.58/2004 under Section 104 read with Order 43, C.P.C. against the order dated 18.9.2003 passed by the learned Additional District Judge No.3, Jodhpur in Civil Misc. Case No.61/1995.

Date of Judgment: August 25, 2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. Tribhuvan Gupta, for the appellant.

Mr. J.R. Patel)
Mr. Sachin Bhati)for the respondent.

BY THE COURT:

This appeal is against the order dated 18.9.2003 by which the learned Addl. District Judge No3, Jodhpur dismissed the application filed by the appellant-defendant under Order 9 Rule 13, C.P.C. for setting aside of the decree dated 15.11.1995 passed in Civil Original Suit No.172/1995.

Brief facts of the case are that the plaintiff-respondent filed a suit for specific performance of the contract before the trial court on

5.10.1995, upon which summons were issued to the defendant-appellant by order dated 5.10.1995 and the court fixed the date as 10.10.1995. The summons were not issued by the office and therefore, on 10.10.1995 the court directed the office to issue summons and fixed the date 16.10.1995 (why such a short date of 6 days was given in regular civil suit for service of summons upon the defendant is not clear from record). On the next date,i.e. on 16.10.1995, after six days , the court ordered to proceed ex parte against the defendant-appellant as the defendant failed to appear despite service of summon. The summon was not served personally upon the defendant but was served by affixture of the summon. In evidence, the plaintiff gave his own statement and produced two witnesses Smt. Bhagwati and Vishnu in support of his case. The trial court decreed the suit for specific performance of the contract by judgment and decree dated 15.11.1995.

The defendant-appellant submitted an application under Order 9 Rule 13, C.P.C. on 9.12.1995 stating therein that he had no knowledge of the suit and when he came to know about the fact that the plaintiff has obtained a decree against him, he engaged advocate and obtained the copies of the plaint etc. and he found that a false report has been obtained by the plaintiff on the summon of the defendant-appellant of refusal to accept the summons. According to the defendant-appellant,

summon was never offered nor he refused to accept the summon and all the proceeding were concocted by the plaintiff. It is also submitted that even when the defendant was served with notice by the plaintiff, he responded that notice and gave a reply through his advocate immediately. It is also submitted that there was no reason for him to not to contest the suit.

The plaintiff submitted reply before the court below. In reply, the plaintiff stated that summons were issued by the order of the court dated 5.10.1995 but were not issued by the court office and ultimately summon issued for the date 16.10.1995 were offered to the defendant-appellant but he refused to accept the summons. Thereupon, the process server in the presence of two witnesses Sanjay and Smt. Maya, who were residents of the same locality, affixed the summons on his habited residential house. The plaintiff denied all the allegations which were levelled by the defendant against the plaintiff in the application filed under Order 9 Rule 13, C.P.C. and stated that the summons were duly served upon the defendant. Therefore, defendant-appellant's application be dismissed. It is also submitted that the application is barred by time.

In the trial court, in proceedings for setting aside decree dated

15.11.1995, evidence was produced by both the parties and the applicant defendant-appellant gave his own statement as AW 1 and produced witnesses AW 2 Sanjay Mishra who is one of the witness at the time of service of summon upon the defendant. The non-applicant plaintiff-respondent gave his statement as NAW 1 and produced witnesses NAW 2 Mohd. Farid, NAW 3 Smt. Maya who witnessed the service upon the defendant and NAW 4 Smt. Bhagwati, who was witness in the main suit for the plaintiff and against whom defendant levelled allegations in his application under Order 9 Rule 13, C.P.C.

The trial court after narrating the facts and evidence, held that in view of the proviso to Order 9 Rule 13, C.P.C., the irregularities in the service of the summon cannot be a ground for setting aside of the ex parte decree and in view of the statement of plaintiff Ganga Ram, it is proved that summons were affixed on the house of the defendant and there is independent witness Smt. Maya who also proved service of the summon upon the defendant. The trial court also held the application of the defendant under Order 9 Rule 13, C.P.C. as barred by time. In view of the above finding, the trial court dismissed the appellant's application filed under Order 9 Rule 13, C.P.C. Therefore, this present appeal has been filed by the defendant-appellant against the order of the trial court dated 18.9.2003.

According to the learned counsel for the appellant the summon was never offered to the appellant-defendant nor it was affixed on the house of the appellant-defendant. Not only this but according to the learned counsel for the appellant, the plaintiff concocted the story of service of summon with the help of one Smt. Bhagwati, who is a police constable and the suit has been filed to grab the house of the appellant-defendant by collusion of said Smt. Bhagwati with the plaintiff. The appellant also submitted an affidavit before this Court and placed on record photo-stat copy of the two news items to show that the plaintiff and Mst. Bhagwati are related to each other and they used to cheat other persons also. However, that affidavit and the photo-stat copy of the news items are not relevant as there is no reason to accept the facts stated in the news items to be correct at this stage. The learned counsel for the appellant vehemently submitted that the trial court has committed serious error of law in appreciating the evidence of the witnesses and failed to critically examine the statements of the witnesses. It is submitted that the appellant-defendant produce witness Sanjay who clearly stated that no summon was offered to the defendant by the process server nor the summon was affixed on the house of the defendant, then there was no reason for the court below to dismiss the application of the appellant-defendant. It is also submitted that the statement of plaintiff should have been rejected as the plaintiff's

statement is not reliable. It is submitted that the plaintiff in his statement, categorically stated that he has no knowledge whether Mst. Bhagwati had any knowledge of the suit or not and he further stated that he did not produce Mst. Bhagwati as his witness and such material statement exposed the credibility of the plaintiff. In addition to above, the plaintiff clearly stated that he did not disclose his name to the process server nor the process server inquired about the name of the plaintiff, such unusual behaviour of the plaintiff was ignored by the court below while assessing the credibility of the plaintiff's statement. Mst. Bhagwati is intimately connected with the plaintiff which is apparent from the clear fact that Mst. Bhagwati gave detailed statement in the civil original suit about the entire transaction between the plaintiff and the defendant despite this fact and despite the fact that Mst. Bhagwati was produced by the plaintiff himself in the proceedings for setting aside of the ex parte decree, he stated before the trial court that Mst. Bhagwati's statement was not recorded in the main suit. Even the plaintiff's statement cannot be relied upon in view of the fact that according to him, he did not disclose his name to the process server, whereas plaintiff's own witness, process server NAW-2 Mohd. Farid stated on oath that at the time of service of summon, he met with one person named Ganga Ram and he took the process server to the residence of the defendant. It is also submitted that it is not

mentioned on the summon that the plaintiff himself took the process server to the house of the defendant and identified the house of defendant-Pukhraj. The plaintiff did not even put his signature on the back of the summon evidencing his presence on the spot at the relevant time. According to the learned counsel for the appellant-defendant, Mst. Bhagwati was in service in police department as constable and is of the same caste as of the plaintiff. She is deeply interested in the plaintiff which is fully proved from the statement of Smt.Bhagwati herself.

The learned counsel for the respondent vehemently submitted that the summon was duly served upon the defendant in the presence of two witnesses. Even the witness Sanjay produced by the defendant-appellant himself also admitted that he signed the report on summon and in cross-examination he admitted that he is doing C.A., therefore, in view of this admission of the witness of the defendant-appellant, about his signature, there is no reason for believing the rest of the statement of said Sanjay who appears to have been won over by the plaintiff. It is also submitted that the defendant-appellant came with positive case that he got the information of the passing of the decree from Smt. Banoo w/o Mohd. Raffique and he first contacted with his own brother-in-law Murlidhar who took the defendant to the advocate

Shri Dinesh Mal Bhandari and said Shri Dinesh Mal Bhandari, Advocate inquired about details of the case and inspected the file of the suit filed by the plaintiff but the defendant did not produce said Smt.Banoo or Murlidhar or his Advocate Shri Dinesh Mal Bhandari. The defendant did not submit any application for condonation of delay despite the fact that he submitted the application after expiry of the period of limitation for filing application under Order 9 Rule 13, C.P.C. According to the learned counsel for the respondent-plaintiff, the trial court considered each and every evidence and thereafter held that the summon was duly served upon the defendant, therefore, this Court while exercising appellate power, may not interfere in the finding recorded by the trial court on issues of facts which are supported by the trustworthy evidence. The learned counsel for the respondent also submitted that in case the decree under challenge will be set aside then it will be premium to the litigants who are indulged in the dialectics.

I considered the submissions of the learned counsel for the parties and perused the record.

The defendant-appellant in his application filed under Order 9 Rule 13, C.P.C. clearly stated that the summon was never offered to him nor it was affixed on the house of the defendant. The defendant also

stated that he did not entered into any agreement for sale of his house with the plaintiff and in fact, Smt.Bhagwati by-caste Bishnoi, who is in police service, is supporting the plaintiff so that they may grab the house of the defendant. The defendant also stated that the defendant received notice of the plaintiff dated 3.8.1995 and he immediately replied that notice through his advocate on 12.8.1995. In support of his these pleas, he gave his statement on oath. He also stated that on 15.12.1995, the plaintiff came and told that he has obtained the decree against the defendant. He also stated that he immediately contacted with his relation Murlidhar who took him to advocate Shri Dinesh Mal Bhandari and he inquired about the case proceedings. In cross-examination, he stated that Smt.Bhagwati who is in service of the police department, is acting in collusion with the plaintiff and they wanted to grab the house of the defendant. Said Smt. Bhagwati is neighbour of the plaintiff and the defendant both. The defendant was cross-examined and he stated on oath that he gave reply to the plaintiff's notice and in cross-examination, the defendant disclosed name of his advocate. No efforts were made by the plaintiff for calling upon the defendant to produce said notice and the respondent-plaintiff raised objection about non-production of the copy of the reply sent by the defendant to the plaintiff. Nothing came out from the statement of the defendant which may cast any doubt about the credibility of the defendant (PW 1). The

burden upon the plaintiff was negative.

The witness Sanjay Mishra produced by the plaintiff is the person who put his signature on the back of the report prepared by the process server and on the basis of which it is said that the summon was offered to the defendant-appellant in the presence of Sanjay. He on oath stated that the summon was never offered to Pukhraj nor summon was affixed on the house of the defendant. He stated that he signed on the report on Smt. Bhagwati's saying that she has received the summon, therefore, you may sign. This witness Sanjay is also resident of the same mohalla where the plaintiff and defendant are residing. In cross-examination again he stated that Smt. Bhagwati received the summon in his presence but she did not sign on the copy of the summon. There is no reason to disbelieve the statement of Sanjay, whereas learned counsel for the respondent-plaintiff vehemently submitted that witness Sanjay was won over by the defendant-appellant. The facts stated above clearly reveal that it is nobody's case that Sanjay had any enmity with either plaintiff or defendant. It is also not in dispute that Smt. Bhagwati is also resident of the same mohalla and the presence of Smt.Bhagwati at the relevant time cannot be ruled out. The allegation that witness Sanjay was won over by the defendant is not supported by any evidence in view of the fact that in cross-examination, only it came from the statement of

Sanjay that he was knowing Mst. Bhagwati since last eight years on whose saying he signed on the back of summon and further he had no old acquittance with the defendant. From the evidence of Sanjay, it appears that either he stated rightly that he signed the summon in token of receipt of summon by Smt.Bhagwati believing the saying of Smt. Bhagwati or if his statement cannot be relied upon for any purpose. Then his endorsement on the summon about the service of the summon upon the defendant also cannot be accepted in the peculiar facts of this case in the light of the evidence of all other witnesses.

In view of the above evidence, the defendant-appellant discharged his burden and after it, it was the duty of the plaintiff-respondent to prove due service of summon upon the defendant. For this, the plaintiff's own statement, the documentary evidence and statement of his witnesses are relevant.

The plaintiff stated that the process server came to him and he told that show me house of Pukhraj-defendant and thereafter they went to the residence of defendant-Pukhraj at Sargara colony. The summon was offered to Pukhraj and Pukhraj after reading the summon returned it to the process server. According to the plaintiff at that time, the witness Sanjay and Smt.Maya along with four other men were present.

The plaintiff also stated that Prem Singh, Dharmendra and Jeewan were also present but none of any above witness was produced by the plaintiff. The plaintiff also stated that he did not disclose to the process server that he himself is the plaintiff. This shows total unusual behaviour of the plaintiff. There is no explanation why plaintiff did not disclose his identity and why the process server did not enquire about the plaintiff and further why plaintiff's signature was not obtained by the process server. This clearly makes the presence of the plaintiff on spot doubtful and also shows that the plaintiff did not disclose true and correct facts in his statement on oath. There was no reason for the process server to obtain the signature of Sanjay and Smt.Maya only when according to the plaintiff himself, the process server came to him and he accompanied the process server but without disclosing that he is the plaintiff, he took the process server to the house of Pukhraj and it is also unusual behaviour of the process server when he could have obtained the signature of the plaintiff on the court summon (as the process server was not knowing that who is the person accompanying him). This clearly shows that the plaintiff wants to play a game of hide and seek so that he may take stand at subsequent stage which may suit him and which furnishes explanation for not signing the summon but there is no explanation from the process server why he choosed a lady out of about 4 to 5 persons as witness. The plaintiff's hiding his identity

from the process server during this process (if it is true) and process server 's not inquiring about the person who accompanied him to the house of Pukhraj, were the relevant considerations which were not considered by the court bellow at all.

The witness Smt. Maya stated on oath that she came to the shop of Pukhraj for purchasing some goods and at that time a person from the court came there where 2-4 men were already present and Sanjay was also present there. The court peon came with Gangaram-plaintiff and he (court peon) asked where is the house of Pukhraj. Then the men present there told the court peon about the house of Pukhraj. This statement belied the statement of the plaintiff Gangaram who stated that he took the court peon to the house of defendant and identified the house of Pukhraj. The statement of Smt.Maya also cannot be relied upon because of the simple reason that when the plaintiff-Gangaram himself was with the court peon then what was the necessity for the court peon to ask other person to show the house of the defendant-appellant Pukhraj. Plaintiff's witness Smt.Maya admitted that she is not literate and she did not ask the court peon what he has written on the back of the summon. The witness Maya first stated that she is not knowing any lady having name of Bhagwati and in the same breath she stated that Bhagwati is in service in police department and is residing in the colony and she knows

her and she is present in the court also. In view of the totality of facts, the statement of the said witness Smt.Maya cannot be relied upon as she comes out with a totally improbable story and there is no explanation that when the plaintiff himself brought the process server then what was the necessity of asking of process server to other persons to show the house of Pukhraj and her initial denial about knowing of Smt.Bhagwati cannot be ignored.

The statement of Smt.Bhagwati is to the effect only that according to her she knows Pukhraj and Gangaram both and she denied that she ever said Sanjay to sign the summon. She is neither the witness of the service of the summon upon the defendant nor she was present at the time of the alleged service upon the defendant, therefore, so far as service of summon upon the defendant is concerned, her statement is not much relevant.

In the light of above evidence, the statement of the witnesses produced by the plaintiff and discussed above, cannot be relied upon. In a suit for specific performance of contract, once summons were signed by the court by order dated 10.10.1995 and date was fixed only after six days and on that date process server reported that he served the summon by affixture. In the light of above evidence, it cannot be

believed that in fact the summon was offered to the defendant and on his refusal, summon and the copy of the plaint were affixed on the house of the defendant, therefore, the defendant could have submitted the application for setting aside of the ex parte decree from the date of knowledge. For the knowledge of the defendant, the defendant as stated above, stated that he came to know about the suit and its decision as the plaintiff himself told him that he obtained the decree against him. Assuming for the sake of argument that that was the stand taken by the defendant but was denied by the plaintiff but he disclosed the name of his advocate who inspected the file of the case of the plaintiff and said advocate informed about the particulars of the case to the defendant and the advocate himself has signed the application under Order 9 Rule 13, C.P.C., there appears to be no reason to believe that the appellant-defendant had knowledge of the suit or its proceedings prior to the date than disclosed by him in the application. Therefore, the trial court was wrong in dismissing the application holding the application as barred by time. It will be relevant to mention here that the suit was decreed by the trial court on 15.11.1995 and the defendant submitted the application for setting aside of the ex parte decree on 19.12.1995, therefore, there was delay of only 4-5 days. In such circumstances, the trial court should have even condoned the delay if there was any short delay of few days in moving the application by the

defendant.

In view of the above discussion, the appeal of the appellant is allowed. The order of the trial court dated 18.9.2003 is set aside and the application filed by the defendant-appellant under Order 9 Rule 13, C.P.C. Is allowed. Both the parties are directed to remain present before the trial court on 20.10.2005. The trial court may decide the suit expeditiously.

(PRAKASH TATIA),J.

mlt.